



## NJSIG's FREQUENTLY ASKED COVID-19 COVERAGE QUESTIONS & ANSWERS

NJSIG has prepared this material based on questions received from our members and our broker community. These questions and answers describe NJSIG's general approach to COVID-19 claims at this time, and should not be construed as legal advice, or as a coverage position on a specific claim. Each claim must be evaluated on its own merits, and the analysis will depend on the specific facts of a claim, as well as the state of the law.

**1. Would a member school district have coverage if a student or parent claims that they contracted COVID-19 after being infected by the SARS-CoV-2 virus on school premises during the school day?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy. There is no communicable disease exclusion or "pandemic clause" in NJSIG's GL policy. Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language. However, the student or parent would have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the student or parent would likely also have a hard time proving that they contracted the virus on school premises, during the school day.

**2. If a member school district employee contracts COVID-19 and claims that they were infected by the SARS-CoV-2 virus on school premises during the school day, would workers' compensation apply?**

Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. In the case of a disease – here, COVID-19, caused by the SARS-CoV-2 virus – the investigation would focus on whether the employee's COVID-19 is a "compensable occupational disease" under N.J.S.A. 34:15-31. In the case of an infectious agent that causes a disease, the core inquiry is whether the employee was infected in the course of their employment, and thus contracted the disease in the course of their employment. See *Bird v. Somerset Hills Country Club*, 309 N.J. Super. 517, 521-22 (App. Div. 1998). Given how widespread the virus is, as well as how difficult it is to track, it may be difficult for the employee to prove that they



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contracted the virus on school premises during the school day. However, that would be the core inquiry of NJSIG's investigation. In the event the investigation indicated that the employee was infected with SARS-CoV-2 in the course of their employment, and thus contracted COVID-19 in the course of their employment, the claim would likely be accepted as compensable. In the event that the investigation indicated that the employee was not infected with SARS-CoV-2 in the course of their employment, and thus did not contract COVID-19 in the course of their employment, the claim would likely not be accepted as compensable. If the employee disagreed with the outcome of the investigation, they would have the option of contesting that compensability determination via the filing of a workers' compensation claim petition. NJSIG would then assign – and pay for – counsel to defend the member against that claim petition. In the event that a judge of the Division of Workers' Compensation determined that the employee was infected in the course of their employment, and thus contracted the disease in the course of their employment, the claim would likely need to be accepted as compensable, and adjusted accordingly.

*For more information on this topic, click [here](#) for NJSIG's newsletter entitled "COVID-19 and Workers' Compensation Issues Facing School Boards," prepared by John Geaney, Esq. of Capehart Scatchard.*

### **3. If a member school district employee contracts COVID-19 and claims that they were infected by the SARS-CoV-2 virus on school premises, but during a time when the school building was closed to the public, would workers' compensation apply?**

Answer: As above, this workers' compensation claim would first be investigated by NJSIG for compensability, under the same parameters outlined in the answer to question 2. That being said, in this case, it would likely be even more difficult for the employee to prove that they contracted the virus while on school premises, as the employee claims that they were infected when very few, if any, other people were in the building from whom the employee could have contracted the virus.

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### **4. If a member school employee trips, falls and is injured in a school building during a time when the school building is closed to the public due to the pandemic, would workers' compensation apply?**

Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. An injury will only be compensable under workers' compensation when it "is caused to an employee by [an] accident arising out of and in the course of his employment[.]" N.J.S.A. 34:15-1. Notably, "[a]n employee need not actually be working in order to meet the 'course of employment' test." Coleman v. Cycle Transformer Corp., 105 N.J. 285, 289 (1986). However, the claimant must establish "that the work was at least a contributing cause of the injury and that the risk of the occurrence was reasonably incident to the employment." Id. at 290. In this scenario, if the employee needed to enter the school building in order to accomplish some task that was reasonably related to their employment, the injury would more likely be compensable. On the other hand, if the employee was in the school building in order to retrieve personal items, see Zahner v. Pathmark Stores, Inc., 321 N.J. Super. 471, 481 (App. Div. 1999), or if the employee had specifically been instructed not to enter the school building, see Robertson v. Express Container Corp., 13 N.J. 342 (1953), it is less likely that the injury would be compensable.

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### **5. If, during a time when school buildings are closed to the public due to the pandemic, a school gym teacher trips, falls and is injured at home while teaching a gym class remotely, would workers' compensation apply?**

Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. An injury will only be compensable under workers' compensation when it "is caused to an employee by [an] accident arising out of and in the course of his employment[.]" N.J.S.A. 34:15-1. The definition of "employment" includes situations in which an employee is physically away from the employer's premises but is still "engaged in the direct performance of duties assigned or directed by the employer[.]" N.J.S.A. 34:15-36; see Cooper v. Barnickel Enters., Inc., 411 N.J. Super. 343, 346 (App. Div. 2010). In this scenario, because school buildings were closed due to the pandemic, the gym teacher was instructed by the district to teach gym



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remotely from home. The gym teacher's job was to teach gym. Assuming that that is what the teacher was doing when they were injured, this claim would likely be deemed compensable, regardless of the fact that the injury occurred at home.

*For more information on this topic, click [here](#) for NJSIG's newsletter entitled "Coverage for Home Injuries in New Jersey," prepared by John Geaney, Esq. of Capehart Scatchard.*

### **6. Would a member school district have coverage if a student trips, falls and is injured at home while engaging in exercise that was assigned by a school gym teacher or coach?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy. Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language. However, the student would likely have a difficult time proving that they were entitled to damages in such a case. While a school has a duty to exercise reasonable care for a student "in its custody," a student receiving virtual education from home is not in the school's custody. Jerkins v. Anderson, 191 N.J. 285, 289, 306 (2007) ("A school district's responsibility has temporal and physical limits, and its obligation to act reasonably does not diminish the responsibilities that parents or guardians have to their children."). Moreover, this claim may also be barred by certain immunities in the New Jersey Tort Claims Act. See N.J.S.A. 59:6-3.

### **7. Would a member school district have coverage if a school hosted a daycare program for the school staff's children on school premises, during the school day, and: (1) one of the children trips, falls and is injured while attending the daycare? (2) one of the children contracts COVID-19 and claims that they were infected by SARS-CoV-2 on school premises during the school day?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy in both scenarios. As to scenario (1), NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language, just as it would for any other third party that suffered a trip and fall injury on school premises during the school day. As to scenario (2), as outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's GL policy. Thus, NJSIG would pay for an attorney to defend the claim, and



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pay for any settlement or damages that result, consistent with the policy language. However, the child would likely have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging “injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.” N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the child would likely have a very difficult time proving that they contracted the virus on school premises during the school day.

**8. Would a member school district have coverage if it re-opened its outdoor basketball courts to the public, or permitted other school districts to use its athletic fields, and someone were to claim that they were infected by the SARS-CoV-2 virus, and contracted COVID-19, as a result of using those facilities?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability (“GL”) policy. As outlined above, there is no communicable disease exclusion or “pandemic clause” in NJSIG's GL policy. Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language. However, the claimant would likely have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging “injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.” N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the claimant would likely also have a very difficult time proving that they contracted the virus on school premises.

**9. Would a member school district have coverage under their property policy or otherwise that would pay for cleaning, disinfecting, or decontamination of a school building if a person who was on school premises is later diagnosed with the SARS-CoV-2 virus?**

Answer: The Ironshore Specialty Insurance Company environmental policy, which is provided to NJSIG property members as a pass-through coverage, provides coverage for “disinfection expenses” that arise out of “disinfection event[s],” as those terms are



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defined in the policy. There is a \$50,000 member deductible on this coverage part. If a claim was made under this coverage part, Ironshore, rather than NJSIG, would conduct an investigation in order to determine coverage. Coverage would depend on the specific details of the claim.

### **10. What COVID-19-related waivers does NJSIG recommend or require that member districts have completed by students, parents, staff, or visitors?**

Answer: NJSIG does not require or recommend that its members have students, parents, staff, or visitors execute COVID-19-related waivers at this time. Part of the benefit of waivers is that they put potential litigants on notice of certain risks. However, considering that COVID-19 has been declared a worldwide pandemic by the World Health Organization, a national emergency in the U.S., and a state of emergency and public health emergency in New Jersey, it is unclear how much protection, in terms of risk acknowledgement, a waiver could really provide. Moreover, not all waivers are enforceable, and in some cases, they may even be prohibited. For example, in response to claims that school districts were “requiring parents or guardians to waive certain legal rights or give written consent for services as a condition for receipt of special education or related services,” the New Jersey Department of Education (NJDOE) recently issued guidance prohibiting the practice as violative of both the Individuals with Disabilities Education Act (IDEA) and NJDOE regulations. Read the full NJDOE memo [here](#).

Furthermore, at least in the context of commercial recreational facilities, New Jersey courts will not enforce “pre-injury” waivers signed by parents purporting to release liability for their child’s potential future injuries. Hojnowski v. Vans Skate Park, 187 N.J. 323, 338 (2006). Moreover, with very little exception, agreements that seek to prospectively deprive employees of workers’ compensation benefits are void as against public policy. Vitale v. Schering-Plough Corp., 231 N.J. 234, 255-256 (2017). Finally, and more generally, if a waiver is deemed to be a “contract of adhesion,” i.e., if it is “presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the ‘adhering’ party to negotiate except perhaps on a few particulars,” a court “may decline to enforce it if it is found to be unconscionable.” Id. at 246 (internal quotations omitted). With this in mind, districts considering COVID-19-related waivers may want to consult with board counsel first.



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### 11. Does NJSIG have any recommendations or requirements with regard to schools reopening?

Answer: NJSIG does not have any specific recommendations with regard to reopening schools at this time, but we strive to support our members in any way that we can. NJSIG is cognizant of the enormous task facing our members as they prepare to reopen schools in a way that ensures a safe and productive learning environment, and also complies with the myriad guidelines issued by federal, state and local officials. To that end, we have compiled the following COVID-19-related resources that we hope our members will find useful at this challenging time:

- Click [here](#) for a compilation of school-specific COVID-19-related guidance and information from the Centers for Disease Control and Prevention (CDC), the New Jersey Department of Education (NJDOE), the New Jersey Department of Health (NJDOH), and more.
- Click [here](#) to get information on free COVID-19-related training courses from SafeSchools and LEGAL ONE *(NOTE: All SafeSchools courses and all LEGAL ONE administrator, principal, and supervisor courses are included with NJSIG membership and are available at no cost to members.)*
- Click [here](#) to access NJSIG's FAQ's on COVID-19-related employment issues, prepared by the law firm of Cleary, Giacobbe, Alfieri & Jacobs, LLC.
- Email [nepha@cgajlaw.com](mailto:nepha@cgajlaw.com) or call 1-201-623-1223 to reach NJSIG's Employment Practices Hotline Attorney, aka the NEPHA hotline, which is administered by the law firm of Cleary, Giacobbe, Alfieri & Jacobs, LLC. NJSIG's E&O members can use this hotline to get answers on prospective employment actions they are considering, including those related to COVID-19. *(NOTE: This service is included with NJSIG's E&O coverage and is available at no additional cost to E&O members. We ask that only superintendents, business administrators, or human resource managers make inquiries to the hotline.)*



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- Click [here](#) for NJSIG's newsletter entitled "COVID-19 and Workers' Compensation Issues Facing School Boards," prepared by John Geaney, Esq. of Capehart Scatchard.
- Click [here](#) to access NJSIG's SafetyNet Newsletters, which highlight important safety considerations and resources, including those related to COVID-19.
- Click [here](#) to access NJSIG's COVID-19/SARS-CoV-2 Response page, to access all of the valuable information and resources compiled by NJSIG related to COVID-19.
- Email [riskcontrol@njsig.org](mailto:riskcontrol@njsig.org) to reach your NJSIG Safety and Risk Control Representatives, for loss control assistance and risk management services.
- Email [jdavis@njsig.org](mailto:jdavis@njsig.org) or [jsemptimphelter@njsig.org](mailto:jsemptimphelter@njsig.org) to reach your NJSIG Client Relations Representatives, who are here to help answer questions and concerns.